

REMARKS

The Examiner has delineated the following invention as being patentably distinct:

Group I, Claim(s) 1-10 drawn to product. Further election of a single species is required; and

Group II, Claim(s) 11-15 drawn to process of use. Further election of a single species is required.

In response to the Restriction Requirement mailed February 1, 2008, Applicants elect Group I without traverse. The Examiner also required the election of a single species if Group I is elected. Accordingly, Applicants elect Type-II crystals of compound (1) as a single species also without traverse. Claims 1-10 read on the elected inventions.

Further, Applicants reserve the right to file divisional applications on the non-elected subject matter, if so desired, and be accorded the benefit of the filing date of the parent application. Divisional applications filed thereafter should not be subject to a double-patenting ground of rejection. 35 U.S.C. § 121, In re Joyce (Comr. Pat. 1957) 115 USPQ 412.

Restriction is only proper if the claims of the restricted groups are independent or patentably distinct and there would be a serious burden placed on the Examiner if restriction is not required (M.P.E.P. § 803).

Moreover, when making a lack of unity of invention in a national stage application, the Examiner has the burden of explaining why there is no single inventive concept.

The Examiner asserts that Groups I and II do not relate to a single general inventive concept under PCT Rules 13.1 and 13.2 because they lack the same corresponding special technical feature.

The Examiner, however, has not considered that the claims in each group are considered related inventions under 37 C.F.R. § 1.475(b) in which the inventions are

considered to have unity of invention. Applicants submit that while PCT Rules 13.1 and 13.2 are applicable 37 C.F.R. § 1.475(b) provide, in relevant part that “a national state application containing claims to different categories of invention will be considered to have unity of invention if the claims are drawn to (3) a product, process, and method of use.”

In chemical cases, a specified group of materials which do not necessarily belong to an otherwise class can be examined together if together they claim operable substances that cannot be defined by generic language but which nevertheless have a community of chemical or physical characteristics, they need only possess one property in common which is mainly responsible for their function in the claimed relationship. The common characteristic and utility in a generic sense suffices.

Applicants make no statement regarding patentable distinctness of the species, but note that for the restriction to be proper there must be patentable differences.

Applicants submit that the above-identified application is now in condition for examination on the merits and an early notice of such action is earnestly solicited.

Respectfully submitted,

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